No. 543

In the Supreme Court of the United States

OCTOBER TERM, 1951

ON LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

CITATIONS

088444—52—1

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 543

ON LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 44–70) is not as yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 21, 1951 (R. 432).[1] By order dated December 11, 1951, Mr. Justice Jackson extended the time for filing a petition for a writ of certiorari to and including January 19, 1952. The petition was filed on January 18, 1952.

[1] The record in this case, designated by the symbol "R", is unprinted.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the overhearing by a government narcotics agent, through the use of a radio receiver, of a personal conversation in the public room of petitioner's laundry between petitioner and a government employee who had a radio transmitter concealed on his person, constituted an illegal search and seizure.

2. Whether the overhearing of the conversation constituted an interception in violation of Section 605 of the Federal Communications Act.

3. Whether the judgment of conviction should have been reversed because the court admitted testimony that after his arrest, petitioner remained silent in the face of accusatory statements made in his presence, where the court gave a full exposition of the law on the subject in his charge to the jury and admonished them to disregard such evidence.

STATUTE AND CONSTITUTIONAL AMENDMENT INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall

issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 605 of the Act of June 19, 1934, 48 Stat. 1103, 47 U. S. C. 605, provides:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information there-

in contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

STATEMENT

After a jury trial, petitioner was found guilty under both counts of a two-count indictment charging him with (1) selling opium in violation of 21 U. S. C. 173 and 174 and (2) conspiring with one Gong Len Ying, and others unknown, to violate various sections of the United States Code[2] relating to the possession of narcotic drugs (R. II–V). He was sentenced to three years' imprisonment on each count, the terms to run concur-

[2] 21 U. S. C. 173–174; 26 U. S. C. 2553 (a), and 26 U. S. C. 2554 (a).

rently, and was fined $500 on the substantive count (R. 398).

The Government's evidence may be summarized as follows:

On January 22, 1950, about 2:00 o'clock in the afternoon, Benny Gim, an undercover agent of the Bureau of Narcotics, was introduced to Gong Len Ying[3] at a coffee shop in New York City (R. 4, 19, 95). Gim asked Ying if he had any opium to sell, and Ying said that he could supply opium in any quantity at $550 per pound provided he was given sufficient notice beforehand. Gim said he wanted the opium that night, and while Ying at first said he could not get it so soon, he finally agreed to deliver it at 6:30 that evening. (R. 6; see also R. 94–96.)

At 6:30 that evening Gim and Ying met at a previously designated street corner. Ying asked for the money, and Gim counted out $550 for a pound of opium. Ying thereupon told Gim to wait and he would return shortly with the opium. (R. 7).

City detectives who were maintaining surveillance and Narcotics Agent L. J. Lee observed that Ying went to 15 Mott Street and stayed there

---

[3] Gong Len Ying, who is referred to in the testimony as Gong, and in the opinion below as Ying, will hereinafter be referred to as Ying. He was charged as a codefendant, pleaded guilty to both counts of the indictment (R. II–V), and testified as a Government witness during this trial (R. 203). Ying's regular business was selling Chinese food to various laundries (R. 222).

until about 7:00 p. m., when he left with petitioner (R. 97). The two men walked to 79 Mott Street and remained there for 20 to 25 minutes. Ying came out first, followed by petitioner a second or two later. They both stood on the sidewalk about half a minute, and then Ying walked back to the corner where he had met Gim (R. 7, 66–67, 97). Ying testified that at 15 Mott Street he gave petitioner the money he had received from Gim, keeping $70 as his own share, and that the two then went to 79 Mott Street, where petitioner gave him the opium wrapped in a Chinese newspaper (R. 204–205, 225–226).

On Ying's return to the corner, he handed Gim the package still wrapped in the Chinese newspaper (R. 7, 67, 97). Gim took the package to police headquarters where it was opened and found to contain a pound of opium. Ying was seen to return to 15 Mott Street after the transaction on the street corner (R. 67–68, 97).

On February 2, 1950, at about 7:30 p. m. Gim again met Ying. Gim told Ying that "the opium was fairly good" and that he wanted to buy 20 pounds. Ying at first said that he could not get such a large quantity on such short notice, but when Gim took a large roll of bills from his pocket and said he had $10,000 to pay for it, Ying said that he would call his partner. Ying then made a telephone call and on his return said that he was unable to reach his partner (R. 13–14). Gim asked Ying to visit the places his partner

frequented and tell him that he, Gim, wanted the opium that night. Ying agreed to return at 10:30 p. m. and let Gim know definitely whether he could give him the opium (R. 14–15).

Officers followed Ying to Hoboken, New Jersey, and saw him visit three laundries there and then return to meet Gim (R. 70). At 10:30 p. m., Ying told Gim that he had been unable to reach his partner, and asked for more advance notice in the future (R. 15–16, 206–208).

On February 9, about 7:30 p. m., there was, by prior arrangement, another short meeting between Ying and Gim at which Gim asked for twenty pounds of opium (R. 16–17, 47, 211). Ying replied that he could have the opium the following Sunday, February 12, and a meeting was arranged for 12:30 in the afternoon of that day (R. 17, 71, 98, 211–213). Ying testified that he thereupon called petitioner on the telephone and asked him whether he had the opium. Petitioner said he did not know whether he had any and he would see on Sunday, February 12, when they would meet at 15 Mott Street (R. 213–214).

On February 12, about noon, Ying met Gim and told him he "would see the man" about 1:30 p. m. and be ready to deliver (R. 17–18, 71, 99). Ying telephoned petitioner and went with him to a restaurant (R. 72, 83–84, 99, 215–217, 228–230). Ying testified that petitioner

there said (R. 216): "I don't know whether or not we have any [opium]. If there is any money then we will talk." Ying then left petitioner in the restaurant, and rejoined Gim (R. 18, 72, 99, 231–234): Ying told Gim he would have to have the money before he delivered the opium. Gim refused to part with $10,000 without seeing and testing the opium first. Ying left, agreeing to talk with his partner and return in a few minutes (R. 18). He was seen by city detectives and Agent Lee to go back to petitioner in the restaurant and talk with him there in a booth (R. 72, 100). Ying went back and forth between Gim and petitioner three times and each time refused to deliver the opium until he received the money. Finally, seeing that further negotiations were futile, Gim gave the signal that there would be no transaction (R. 17–19, 51, 135). Ying returned to the restaurant where petitioner was waiting (R. 164–165).

City detectives arrested Ying and petitioner as they were walking away from the restaurant together (R. 73, 87, 101, 306). Petitioner was questioned by the city detectives and by the agent in English and Chinese (R. 52, 73, 89). He claimed that he did not know Ying, and had nothing to do with him (R. 73, 89–90, 303).[4] The

[4] At the trial petitioner explained the various transactions with Ying as pertaining to the contemplated purchase of a wet wash laundry (R. 267–275, 282–286), although he testified that he never knew its address (R. 299).

next day, February 13, he was brought before a United States Commissioner for hearing (R. 61). Petitioner was then released on bail (R. 287).

On March 30, 1950, after the release of petitioner on bail, Agent Lee, together with a special employee of the Bureau of Narcotics, Chin Poy, went to one of petitioner's two laundries at 1222 Washington Street in Hoboken, New Jersey (R. 103–104, 178–179). Lee remained outside in the vestibule of a variety store, four doors away, where he operated a radio receiving set which he carried in his brief case (R. 181–183). Chin Poy entered the laundry where he found petitioner (R. 104), who had been an acquaintance for 15 years (R. 292) and was his former employer (R. 298). The laundry consisted of one large room and a storeroom, with separate living quarters in the rear. There was a store window in front of the laundry (R. 191). Agent Lee, listening on his receiver, heard Chin Poy, who carried a radio transmitter on his person, engage in a general conversation with petitioner about the gossip in Chinatown (R. 188). As Chin Poy and petitioner talked, customers would go in and out of the shop getting their laundry (R. 104). During the conversation, Chin Poy asked petitioner if the opium, which he was said to have according to gossip in Chinatown, belonged to him. Petitioner said no, that the opium belonged to a syndicate of which he was the representative (R. 105–107, 115–116, 188). He said he employed

a truck driver by the name of Gong Len Ying who did all the transacting, that he had nothing to do with it and could not get into trouble, and "the Government didn't have anything on him" (R. 116). Chin Poy then asked petitioner if he could place an order for a pound of opium. Petitioner said he could do so as syndicate representative (R. 107–108). At a subsequent meeting between Chin Poy and petitioner, on April 2, 1950, in front of 35 Mott Street in New York City, when Agent Lee again audited the conversation, petitioner again admitted he was the representative of the syndicate (R. 113–114).

ARGUMENT

1. Though he raised no such objection in the trial court,[5] petitioner urged in the court below, and now urges here (Pet. 18–28), that it was error to permit Agent Lee to testify as to the

[5] At the trial, defense counsel objected to the testimony solely on the ground that it related to another transaction not bearing on the crime charged (R. 106–108). The court instructed the jury to disregard any evidence relating to any transaction not included in the crime charged, and charged that the conspiracy is presumed ended by arrest (R. 109). Later, the court again told the jury that petitioner was not being tried for any offense committed after January 22 (R. 114). It did rule that an admission relating to the crime committed on January 22, 1950, could be allowed in evidence regardless of when it was made (R. 114). Defense counsel agreed with this ruling, but contended that the defense was prejudiced by other parts of the same conversation, revealing a later transaction not included in the indictment (R. 114–115).

conversation he overheard on his radio receiver between Chin Poy and petitioner after petitioner's release on bail, arguing that such evidence was obtained in violation of the Fourth Amendment. We submit that this contention was properly rejected.

The decision in *Olmstead* v. *United States*, 277 U. S. 438, established the proposition that the overhearing by a mechanical contrivance of a private conversation is not *per se* violative of the rights secured under the Fourth Amendment where otherwise there is no searching of an individual's house, his person, his papers, or his effects. That ruling, consistently followed by this Court (*Goldstein* v. *United States*, 316 U. S. 114, 120; *Goldman* v. *United States*, 316 U. S. 129, 135; see also *United States* v. *Dennis*, 183 F. 2d 201, 225 (C. A. 2), affirmed, 341 U. S. 494), applies here. Here, as in *Olmstead*, "we have testimony only of voluntary conversations secretly overheard." 277 U. S. at 464. "There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only." *Ibid.*

In *Goldman* v. *United States*, *supra*, as here, officers of the law employed a mechanical device to make a conversation audible beyond the confines of the place in which it was conducted. There, government agents overheard conversations of the defendants by means of a detectaphone affixed to the wall adjoining defendants'

office. In an effort to distinguish the *Olmstead* decision, the defendants argued to this Court that the employment of the detectaphone violated the Fourth Amendment because where "one talks in his own office, and intends his conversation to be confined within the four walls of the room, he does not intend his voice shall go beyond those walls and it is not to be assumed he takes the risk of someone's use of a delicate detector in the next room," 316 U. S. at 135. Rejecting this distinction and refusing to overrule *Olmstead*, this Court held that there had been no violation of the Fourth Amendment. In this case too, we submit, the effort to distinguish a detectaphone from a radio transmitter, both employed to make audible to outsiders speech presumably intended "to be confined within the four walls of the room," is "too nice for practical application of the Constitutional guarantee * * *." *Ibid.*

In his dissenting opinion below, upon which petitioner relies, Judge Frank points out that a contrary result would have been reached in the *Goldman* case had there been a trespass connected with the use of the detectaphone (see 316 U. S. at 134–135), and argues that, in this case, the Government committed a trespass into petitioner's "home" by sending Chin Poy into petitioner's laundry with a radio transmitter attached to his person. It should be noted that this argument in no way affects the admissibility of the testimony based on the subsequent conver-

sation overheard by radio between Chin Poy and petitioner in which petitioner repeated on the street the admission that he was an agent for a syndicate (R. 113–114). It should also be noted that the place where the conversation in question occurred was neither a private home (cf. *Nueslein* v. *United States*, 115 F. 2d 690 (C. A. D. C.)), nor a private office (cf. *Goldman* v. *United States, supra*), but a laundry to which the general public was invited and which was in fact visited by various customers while the conversation was in progress.[6] Cf. *Davis* v. *United States*, 328 U. S. 582, 592–593. If an agent posing as a customer had overheard the petitioner's admissions to Chin Poy, there could have been no question of the admissibility of the agent's testimony, since his entry into the premises would have been legal.

What is more important here, however, is that Chin Poy, the only government agent who entered petitioner's laundry, entered legally, with petitioner's permission, and was voluntarily conversed with by petitioner. While it was concealed from petitioner that the man he addressed was a government agent and that a device was being employed to make the conversation audible to another government agent, there is clearly no

[6] The fact that there were sleeping quarters back of the storage room of the laundry does not establish the contention that petitioner's "home" was invaded as there was no entry into those quarters.

prohibition against the use of artifice to apprehend those engaged in criminal enterprises. See the quotation in the opinion below (Pet. 49, n. 6) from the opinion of Chief Justice Taft in *Olmstead* v. *United States*, *supra*, at 468; see also *Sorrells* v. *United States*, 287 U. S. 435, 441. If Chin Poy had managed to get petitioner to talk loudly enough to be heard by an agent standing next to the laundry, it could not seriously be argued that testimony as to the conversations would be inadmissible. And that, in essence, is the function which the radio transmitter served. Bearing in mind that stratagems are permissible, if not essential, in the apprehension of criminals, we think the substantial identity in operation and purpose between a detectaphone and a radio transmitter leaves no room for creation of a valid Constitutional distinction by artificial extension of the concept of "trespass."

2. Equally without merit is petitioner's contention that the overhearing of his conversation with Chin Poy constituted an "interception" prohibited by Section 605 of the Federal Communications Act (*supra*, pp. 3–4).[7] As the court below held (Pet. 45–46), the simple fact of this case was that there "was no 'interception' of a communication by wire or radio which is what the statute forbids. The radio device was merely a

[7] Like the contention based on the Fourth Amendment, this argument was raised for the first time on appeal. See note 5, *supra*.

mechanical means of eavesdropping, just as the detectaphone was in the *Goldman* case." Petitioner, holding a face-to-face conversation with Chin Poy, was engaged in no communication of the kind safeguarded against interception by the Communications Act. The *Goldman* decision made clear that the purpose of the statute was to protect "the means of communication and not * * * the secrecy of the conversation." 316 U. S. at 133. Even a message sent over a wire is not immune from disclosure where there is no "interception" in the mechanical sense between the lips of the sender and the ear of the receiver. *Ibid.*; *Reitmeister* v. *Reitmeister*, 162 F. 2d 691, 694 (C. A. 2). The terms of Section 605 of the Federal Communications Act could not by any logical interpretation be extended to the protection of direct, untransmitted conversations between two persons.

3. Petitioner also alleges as error (Pet. 33 *et seq.*) the reception into evidence of accusatory statements made in his presence by codefendant Ying after the arrest. Since there is substantial authority to support the position that testimony as to silence when confronted with an accusation is admissible,[8] the court was at least justified in deferring a ruling as to exclusion when the ques-

[8] See *Sparf and Hansen* v. *United States*, 156 U. S. 51, 56; *Egan* v. *United States*, 137 F. 2d 369, 380–381 (C. A. 8); *Graham* v. *United States*, 15 F. 2d 740, 742–743 (C. A. 8).

tion was first raised. And, assuming *arguendo* that such statements were not admissible, any error in their admission was plainly cured by the court's subsequent charge to the jury to ignore them.[9]

At the trial, Detective Monahan testified that, immediately after the apprehension of Ying and petitioner, they were kept apart and questioned. At that time petitioner denied knowing Ying (R. 73). Thereafter, Monahan testified, the two men were "booked" and taken to the Bureau of Narcotics, where they were put together in one room. At this point of the examination, defense counsel objected to any testimony as to what Ying had said after arrest as not binding on petitioner. The court, however, allowed Monahan to testify that, while petitioner at first denied delivering opium to Ying or having anything to do with him (R. 74), later, when Ying admitted receiving the opium from petitioner, petitioner remained silent and said nothing (R. 75). There was extended argument thereafter of the question whether testimony as to silence in the face of an accusatory statement is admissible (R. 75–80). The court reserved decision, and allowed cross-examination to proceed (R. 80). On cross-ex-

[9] *United States* v. *Lo Biondo*, 135 F. 2d 130 (C. A. 2) is plainly distinguishable by the fact that there the trial court gave no instruction to the jury to disregard such evidence. In reversing, the court of appeals made it clear that, had such instruction been given, there would have been no basis for setting aside the conviction. 135 F. 2d at 132.

amination, Detective Monahan testified that petitioner "always denied" having any transaction with any opium (R. 90). Agent Lee also testified that petitioner denied that the opium was his (R. 103). When Ying was questioned by Government counsel as to what the detective had asked him, defense counsel objected (R. 219). Again there was argument as to whether silence in the face of an accusatory statement can constitute an admission (R. 219–222). The court allowed counsel to submit briefs on this point of law (R. 222) and it was not pursued further. After the Government had rested its case, defense counsel again raised his objection to admission of the remarks of Ying after the arrest, and, following extensive argument (R. 244–255), the motion was denied (R. 255). However, in his instructions to the jury, the trial court told them that admissions and statements of a conspirator after the conspiracy has terminated do not bind a co-conspirator (R. 349); that after the arrest of the conspirators the conspiracy is terminated and no admission or statement made by a conspirator after the arrest binds a co-conspirator (R. 349–350); that the act or statement to bind a co-conspirator must be made by a conspirator while the conspiracy is in effect, in furtherance of the object of the conspiracy, and before its termination (R. 350). Later, the court instructed the jury (R. 360): "No admission made by Gong after the arrest can bind On Lee.

I have already so charged, I think, fully." Then the court instructed the jury as follows (R. 360–362):

> I will charge the jury that if before the arrest the defendant made the statement to Monahan or any other agent that he did not make the sale, that he did not make the delivery, that he did not possess the opium, if he denied all that to Monahan or the other agents, and after the arrest in the presence of Monahan and possibly some of the other agents he was told or heard Gong saying, "you gave it to me; you delivered it to me," then under those circumstances the defendant On Lee could remain silent, and his silence would not be regarded as tacit admission that he did so.
>
> The general rule is that when a statement tending to incriminate one accused of committing a crime is made in his presence and hearing, and such statement is not denied, contradicted or objected to by him, both the statement and the fact of his failure to deny are admissible in a criminal prosecution against him, as evidence of his acquiescence in its truth.
>
> Now I modify that by this consideration: if before the arrest he denied that he did it and then after the arrest in the presence of the people to whom he denied it, Monahan and the others, if in their presence he kept quiet when Gong told him "I got it from you; you delivered it to me," in that case I would say that silence did not con-

> stitute and acquiescence cannot be regarded as an admission, because having denied it before, he did not have to deny it again. There was a denial there and he did not have to tell the people to whom he already denied it that it was not so if the statement was made in his presence. He has denied it once and that would be sufficient.

In the light of this charge, we submit, the court below was clearly correct in concluding that neither the colloquies between counsel and the trial court nor the initial admission of his co-defendant's accusatory statements prejudiced petitioner. As to legal arguments during the trial, the courts have necessarily and properly recognized that such discussions of the rules of evidence are not ordinarily regarded by a jury as serious matters or of much concern to them. *Fredrick* v. *United States*, 163 F. 2d 536, 548 (C. A. 9), certiorari denied, 332 U. S. 775; *Goldstein* v. *United States*, 63 F. 2d 609, 613 (C. A. 8). And, while the court below recognized (Pet. 51) that "in exceptional circumstances the prejudice from improperly admitted evidence may be too serious to be cured by a charge to disregard it," there are no such "exceptional circumstances" here as would warrant reversal of the court's judgment that the extensive charge to the jury had cured any possible error. In the light of the evidence which the judge and jury had heard, that Monahan talked with petitioner alone before he booked him and with petitioner and

Ying together after the booking, we think that the phrase "before the arrest" in the charge could not have the implications which the dissenting judge imputes to it. The charge as a whole made it clear that, having previously denied guilt, petitioner was under no duty to repeat the denial despite Ying's accusation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
CARL H. IMLAY,
Attorneys.

FEBRUARY 1952.

U. S. GOVERNMENT PRINTING OFFICE: 1952